

EXHIBIT C

4628925

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FILED
ALAMEDA COUNTY

5 Attorney for Plaintiffs
Cornelius and Teresa Lopes

JUL 16 2007

6 CLERK OF THE SUPERIOR COURT
By John Sean Mahaney
7 Deputy

8 SUPERIOR COURT OF CALIFORNIA

9 IN AND FOR THE COUNTY OF ALAMEDA

10 CORNELIUS LOPES, TERESA LOPES,

11 } Case No: HG0620161

12 } Plaintiffs,

13 } NOTICE OF MOTION AND MOTION TO
AMEND PLEADINGS TO CONFORM
TO PROOF

14 FREMONT FREEWHEELERS, ET.AL.

15 } Trial Date: June 22, 2007
Time: 9:00 a.m.
Dept. TBA

16 } Defendants.

17 TO DEFENDANTS, JASON SAGE; USA CYCLING dba USCF, , NORBA & USPRO

18 FREMONT FREEWHEELERS JEFF WU, BOB PARKER, PAUL CHUCK, LARRY

19 UPTHEGROVE, and LLOYD RATH, AND TO THEIR ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE that prior to the conclusion of plaintiffs' case Plaintiffs,

21 CORNELIUS LOPES and TERESA LOPES will, and hereby do, move this court for an order to
allow them to amend their Complaint to confirm to proof.

22 The motion to amend the Complaint will be made on the grounds that evidence is now
23 before the jury on the issue of plaintiff, CORNELIUS LOPES' prior arrest for the crimes of
battery on two cyclists, on the issue of the prosecution in a prior criminal proceeding, and the
24 resultant emotional distress and harm plaintiffs suffered. Plaintiffs seek to amend their

1 pleadings to assert causes of action for intentional infliction of emotional distress, negligent
2 infliction of emotional distress and malicious prosecution-prior criminal proceeding against
3 defendants, Jason Sage and Fremont Freewheelers. Plaintiffs also seek an award of punitive
4 damages against these defendants. Plaintiffs also have amended their existing causes of action to
5 state more clearly vicarious liability of principals and their agents.; Jason Sage, Fremont
6 Freewheelers, Jeff Wu, USA Cycling dba USCF, NORBA & USPRO.

7 This motion will be based on this notice of motion, on the attached memorandum of
8 points and authorities served and filed herewith, and on the declaration of Patricia A. Turnage
9 filed in support, on the Declaration of Officer Wren attached to the Declaration of Patricia A.
10 Turnage, and on the records and files herein, and on such other oral and documentary
11 evidence as may be presented at the hearing of the motion.

12 .Dated: July 14, 2007

LAW OFFICES OF PATRICIA TURNAGE



Attofney for Plaintiffs, Cornelius Lopes and
Teresa Lopes

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CLERK OF THE SUPERIOR COURT
 By Gloria Sean Mallon
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8 SUPERIOR COURT OF CALIFORNIA

9 IN AND FOR THE COUNTY OF ALAMEDA

10 CORNELIUS LOPES, TERESA LOPES,)
 11)
 12 Plaintiffs,)
 vs.)
 14)
 15 FREMONT FREEWHEELERS, ET.AL.)
 16)
 17 Defendants.)
 18)
 19)

Case No: HG0620161

MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PLAINTIFFS' MOTION TO
 AMEND PLEADINGS TO CONFORM
 TO PROOF

Trial Date: June 22, 2007
 Time: 9:00 a.m.
 Dept. TBA

I.

INTRODUCTION/STATEMENT OF FACTS

On June 12, 2004, while jogging in an office technology park located in Newark, California, the Plaintiff, NEAL LOPES ("LOPES") was struck violently by cyclists/defendants, BOB PARKER, LARRY UPTHEGROVE, LLOYD RATH, and PAUL CHUCK, who ducked under his arm raised in a "high five" position to avoid striking LOPES. These four individuals swung out to the right into LOPES' lane to respond to an "attack" ahead (acceleration by other cyclists). At the time of the collision with LOPES the cyclists were trying to get ahead in a bicycle race (a criterium promoted and staged by defendant FREMONT FREEWHEELERS ("the

1 race"). The course was made up of two public streets that ran within the technology park; i.e.,
2 Stevenson Blvd. and Eureka Streets, in Fremont and in Newark, California. Unbeknownst to
3 LOPES, his lane and the lane adjacent to him made up the course for the bicycle race.

4 JASON SAGE of FREMONT FREEWHEELERS was required to obtain a permit, but
5 the permit did not close the course to the public. There were no signs posted, warning the public
6 that a race was being conducted in the area. Although FREMONT FREEWHEELERS had
7 "sandwich board" signs in its storage locker, Tim O'Hara, the one who came early to set up the
8 race, did not bring them with him. There was no banner publicizing the start/finish line for the
9 race. LOPES was aware there were many cyclists present but he was not aware that a race was in
10 progress while he continued to jog around the office park. LOPES had jogged in this area
11 previously. It was not unusual to see cyclists in the area where he was jogging and to share the
12 technology park with them.

13 Prior to the race's start at 8:00 a.m., LOPES had been jogging for approximately 45
14 minutes on what was to be the course. He had been jogging in one lane, closest to the curb.
15 Before the race started, a cyclist, Tim O'Hara, had cycled up next to him as LOPES continued to
16 jog. LOPES answered in response to a question as to how long he would be, "I'll be done in a
17 few". Tim O'Hara was riding three to five feet (3'-5') behind Lopes when he claims that he
18 heard Lopes say "Fuck you Jew". O'Hara did not see LOPES move his lips, but he is certain this
19 is what he heard. LOPES denies that he made the statement O'Hara told others he had said.

20 Before the race started, O'Hara expressed his concern to the other cyclists and the chief
21 referee, Jeff WU, regarding LOPES' presence on the course. Wu, was trained and provided by
22 USA CYCLING dba USCF, NORBA & USPRO, who sanctioned the race. FREMONT
23 FREEWHEELERS hired WU and paid him for his services. WU decided that the race could be
24 run safely as long as the cyclists stayed on their side of the road, never encroaching on LOPES'
25 running space. The cyclists agreed that they were "Masters" and that they could navigate near
26 LOPES safely. After the race started, LOPES passed by the cyclists who were riding in the lane
27 adjacent to him in a clockwise direction. He was running counter-clockwise in the lane adjacent
28

1 to them in the laps before the collision occurred. LOPES was aware they were there and passed
 2 them in the laps prior to the collision without incident. In the lap where the collision occurred,
 3 the cyclists swung to the right to respond to the bicycle "attack". Without warning, LOPES was
 4 mowed down in his lane, approximately 10' from the inner curb.

5 At the trial of this matter, Plaintiffs filed a motion in limine to exclude evidence of
 6 LOPES' criminal prosecution. That motion was denied as LOPES' psychologist, Dr. Ramseur,
 7 was going to testify that he treated LOPES for the trauma of the bicycle accident and for the
 8 trauma stemming from being charged with a crime and its legal aftermath. Dr. Ramseur was also
 9 expected to testify that he could not separate his treatment for these two traumas as one merged
 10 into the other. For that reason, plaintiffs' motion in limine was denied. The court directed that
 11 the jury would be told that "Mr. Lopes was tried for two counts of battery on the cyclists, a
 12 mistrial was declared and the case was dismissed." In plaintiffs' voir dire and in opening
 13 statement, plaintiffs' counsel repeated these words exactly as his honor had directed. The judge
 14 also stated that plaintiffs' counsel would undoubtedly put in evidence of the damages LOPES
 15 and his wife suffered as a result of LOPES being charged with the crimes, arrested and
 16 prosecuted. Therefore, Plaintiffs
 17 motion to amend to conform to proof should come as no surprise to the defendants.

18 At the time Plaintiffs filed their complaint, they did not know that what they viewed to be
 19 prejudicial evidence against LOPES would be allowed at trial. Therefore, they did not include
 20 causes of action in their complaint for malicious prosecution, or for the emotional distress they
 21 suffered from LOPES being charged with crimes of battery on the cyclists and its legal aftermath.
 22 By way of this motion, Plaintiffs seek to amend their pleading to assert those causes of action as
 23 there is now factual evidence at trial to support Plaintiffs' recovery on these causes of action.

24 **II.**

25 **LEGAL ARGUMENT**

26 **A. THIS COURT HAS THE DISCRETION
 27 TO PERMIT AMENDMENT OF PLEADINGS
 DURING TRIAL.**

1 Code of Civil Procedure Section 576 allows the judge, at any time after commencement o
 2 trial to allow amendment of a Complaint. Amendment of a Complaint is allowed in the
 3 furtherance of justice, and upon such terms as may be proper. See also *Norager v. Nakamura*
 4 (1966) 42 Cal.App.4th 1817, 1819 wherein the Court of Appeal allowed the plaintiff to amend
 5 his complaint on the last day of a 4-day trial. A motion for leave to amend to conform to proof
 6 may be made at any time during trial, so long as a judgment has not yet been entered and the
 7 amendment would not prejudice a party. See *Union Bank v. Wendland* (1976) 54 Cal.App.3d
 8 393, 400-401.

9 In the present case this motion is being made well before the last day of what appears to
 10 be at least a ten day trial. Further, to allow Plaintiffs to seek damages for the added causes of
 11 action of negligent infliction of emotional distress, intentional infliction of emotional distress and
 12 malicious prosecution does not prejudice Defendants. Indeed, it is Defendants who insisted that
 13 evidence of LOPES' criminal conviction be introduced to the jury. Certainly, they must have
 14 considered any prejudice that could befall them should they successfully oppose Plaintiffs'
 15 Motion in Limine to exclude such evidence, which they did. See Declaration of Patricia A.
 16 Turnage filed in support of this motion to amend the Complaint.

17 Additionally, if the issues raised by the proposed amendment were in fact fully tried and
 18 the evidence is already before the court, it is difficult for the opposing party to claim prejudice.
 19 See *North 7th Street Associates v. Constante*, (2001) 92 Cal.App.4th Supp. 7, 10. Under such
 20 circumstances it may be an abuse of discretion to deny leave to amend the pleadings to conform
 21 to proof. *South Bay Bldg. Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th
 22 Supp. At 12.

23 B. **THE THREE CAUSES OF ACTION**
 24 **PLAINTIFFS WISH TO ADD TO THEIR**
 25 **COMPLAINT ARISE OUT OF LOPES'**
 26 **WRONGFUL CRIMINAL PROSECUTION.**

27 As discussed above, at the time of the filing of their Complaint, Plaintiffs did not
 28 contemplate that the jury would be told of LOPES' criminal prosecution. It was only after

1 Plaintiffs' motion in limine was denied that Plaintiffs came to realize that the jury would learn
 2 about the prosecution. The court also advised Plaintiffs that they would be allowed to put on
 3 evidence of the damages that flow from (1) the stress and fear after being charged with a crime;
 4 (2) the embarrassment, humiliation, fear, and stress that comes from being served with an arrest
 5 warrant and (2) the embarrassment, stress and humiliation that result from appearing as a
 6 defendant before one's peers in a criminal trial. Therefore, this court has allowed Plaintiffs to
 7 introduce evidence through Plaintiffs' testimony and that of Dr. Ramseur, of Plaintiffs'
 8 embarrassment, humiliation, fear and stress resulting from being charged with crimes and the
 9 legal aftermath that occurred. Therefore, Plaintiffs seek to amend their Complaint to assert causes
 10 of action that will allow them to recover for these damages.

11 **C. THIS COURT SHOULD PROPERLY ALLOW**
 12 **PLAINTIFFS TO AMEND THEIR PLEADINGS**
 13 **TO ASSERT A CAUSE OF ACTION FOR**
 14 **INTENTIONAL INFILCTION OF EMOTIONAL**
 15 **DISTRESS.**

16 The elements of a cause of action for emotional distress damages arising out of
 17 intentional conduct are:

- 16 1. That the defendant's conduct was outrageous;
- 17 2. That the defendant intended to cause emotional distress to plaintiff; or
 That the defendant acted with reckless disregard of the probability that
 plaintiff would suffer emotional distress, knowing that plaintiff was
 present when the conduct occurred;
- 18 3. That plaintiff suffered severe emotional distress; and
- 19 4. That defendant's conduct was a substantial factor in causing plaintiff's
 severe emotional distress.

20 Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety,
 21 worry, shock, humiliation and shame. Serious emotional distress exists if an ordinary, reasonable
 22 person would be unable to cope with it.

23 In the present case there are facts which are now evidence before the jury to prove all of

1 the required elements of this cause of action.

2 1. Defendant Jason Sage's conduct on his behalf and on behalf of the Fremont
3 Freewheelers was intentional and outrageous when he actively worked
4 to feed information to the Newark Police Department which he knew was not true
5 as he did not know what happened. He was not a witness to the accident. He has
6 testified that there were no eye witnesses to the accident. All that Jason Sage and
7 the Fremont Freewheelers knew about the actual collision was based on rumors
8 and not on facts. Therefore, his insisting that the District Attorney charge LOPES
9 with the crimes of battery on two cyclists was purposeful and outrageous.

10 2. Defendant Jason Sage admitted that he had written an e-mail in which he stated
11 that LOPES' would get a "fine and light jail time". By this statement it is clear
12 that he understood that LOPES faced confinement. It is a well-known fact that
13 confinement in jail causes emotional distress as one's freedom is taken away.

14 3. LOPES and his wife did indeed suffer serious emotional distress.
15 LOPES psychologist, Dr. Ramseur testified that he treated LOPES for emotional
16 distress from his being charged with a crime. He also testified that LOPES
17 was extremely upset and stressed when he learned in October, 2005 that
18 the District Attorney had decided to go forward on the prosecution and that the
19 charges were not going to be dismissed. Plaintiff, Teresa Lopes, testified
20 that the stress her family experienced was multiplied by ten after her husband
21 was charged with a crime.

22 4. Defendant, Jason Sage, and all of the conduct from the members of the Fremont
23 Freewheelers race committee (Tim Ohara, Richard Brockie, to name a few) in
24 providing theories and conjecture to the police regarding LOPES' conduct which
25 resulted in the police recommending to the District Attorney that LOPES be
26 charged. The investigating officer, Joseph Wren, did nothing further to
27 investigate beyond interviewing those in the Fremont Freewheelers who reported

1 that LOPES intentionally hit the riders when they had no factual basis to support
 2 such an allegation. See Declaration of Joseph Wren, attached to Declaration of
 3 Patricia A. Turnage, filed in support of this motion. Later, through their
 4 investigation, it became clear that there were no eyewitnesses to what had
 5 happened to justify that LOPES should be tried for crimes. Nonetheless, Jason
 6 Sage and Fremont Freewheelers continued to push for conviction and said nothing
 7 to authorities to advise them that their statements were merely conjecture and
 8 theories without any factual basis to establish
 9 that LOPES caused the accident. On the contrary, their investigation confirmed
 10 that an attack was in progress and that Chuck, Parker, Rath, and Upthegrove
 11 moved to the right, into the path of LOPES. All cyclists who have testified in this
 12 trial, have placed LOPES ten (10) feet away from the inside curb
 13 before and after the race began. All cyclists who have testified have placed
 14 LOPES' approximately ten (10) feet from the inside curb lane at the time he was
 15 struck by Bob Parker head-on and knocked unconscious.

16 At all times mentioned, Jason Sage was acting as an agent for Fremont Freewheelers,
 17 who ratified his conduct. Therefore, Fremont Freewheelers as his principal is vicariously liable
 18 for the intentional conduct of its agent, Jason Sage. See e-mail from Jason Sage "Sally is cool
 19 with it", proving that Sally Wilson, president of the Fremont Freewheelers, had knowledge of
 20 what Jason Sage was doing and ratified his conduct.

21 Therefore, plaintiffs request that this court order that plaintiffs may amend their
 22 Complaint to allege this cause of action against Jason Sage and the Fremont Freewheelers, to
 23 state more clearly vicarious liability in previously pled causes of action, and to include in their
 24 amended complaint a prayer for punitive damages.

25 D. **THIS COURT SHOULD PROPERLY ALLOW**
 26 **PLAINTIFFS TO AMEND THEIR PLEADINGS**
 27 **TO ASSERT A CAUSE OF ACTION FOR**
 28 **NEGLIGENT INFILCTION OF EMOTIONAL**
 DISTRESS.

1 The elements of a cause of action for emotional distress damages arising out of negligent
 2 conduct are:

- 3 1. That the defendant's conduct was negligent;
- 4 2. That plaintiff suffered severe emotional distress; and
- 5 3. That defendant's negligence was a substantial factor in causing plaintiff's
 serious emotional distress.

7 Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety,
 8 worry, shock, humiliation and shame. Serious emotional distress exists if an ordinary, reasonable
 9 person would be unable to cope with it.

10 In the present case there are facts which are now evidence before the jury to prove all of
 11 the required elements of this cause of action.

12 All of the facts that support this cause of action are identical to the discussion above,
 13 except that negligent conduct is substituted for intentional conduct. In other words, Jason Sage
 14 and the Fremont Freewheelers knew or should have known that their conduct would cause
 15 plaintiffs severe emotional distress, and that their negligent conduct did result in severe
 16 emotional distress to both plaintiffs.

- 17 1. Defendant Jason Sage's conduct on his behalf and on behalf of the Fremont
 Freewheelers was negligent in that he knew or should have known that it would
 cause plaintiffs serious emotional distress. He actively worked to feed
 information to the Newark Police Department which he was not certain was true
 as he did not know what happened. He was not a witness to the accident. He has
 testified that there were no eye witnesses to the accident. Therefore, his insisting
 that the District Attorney charge LOPES with the crimes of battery on two cyclists
 when he knew or should have known that this would have caused LOPES serious
 emotional distress was negligent conduct. At all times mentioned, Sage was
 acting as an agent for Fremont Freewheelers, who ratified his conduct. Therefore,
 it is vicariously liable for his negligent acts.

1 2. Defendant Jason Sage admitted that he had written an e-mail in which he stated
2 that LOPES' would get a "fine and light jail time". By this statement it is clear
3 that he understood that LOPES faced confinement. It is a well-known fact that
4 confinement in jail causes emotional distress as one's freedom is taken away.

5 3. LOPES and his wife did indeed suffer severe emotional distress.
6 LOPES psychologist, Dr. Ramseur testified that he treated LOPES for emotional
7 distress from his being charged with a crime. He also testified that LOPES
8 was extremely upset and stressed when he learned in October, 2005 that
9 the District Attorney had decided to go forward on the prosecution and that the
10 charges were not going to be dismissed. Plaintiff, Teresa Lopes, testified
11 that the stress her family experienced was multiplied by ten after her husband
12 was charged with a crime.

13 4. Defendant Jason Sage and all of the conduct from the Fremont Freewheelers
14 in providing theories and not actual facts to the police resulted in the police
15 recommending to the District Attorney that LOPES be charged. The investigating
16 officer, Joseph Wren, did nothing further to investigate beyond interviewing
17 those in the Fremont Freewheelers who reported that LOPES intentionally
18 hit the riders when they had no factual basis to support such an
19 allegation. Later, through their investigation, it became clear that there were
20 no eyewitnesses to what had happened to justify that LOPES should be tried for
21 crimes. Nonetheless, Jason Sage and Fremont Freewheelers continued to push for
22 conviction and said nothing to authorities to advise them that their statements
23 were merely conjecture and theories without any factual basis to establish
24 that LOPES caused the accident. On the contrary, their investigation confirmed
25 that an attack was in progress and that Parker, Rath, and Upthegrove moved to the
26 right, into the path of LOPES. actively participated. All cyclists who have
27 testified in this trial, have placed LOPES ten (10) feet away from the inside curb

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before and after the race began. All cyclists who have testified have placed LOPES' approximately ten (10) feet from the inside curb lane at the time he was struck by Bob Parker head-on and knocked unconscious.

4 At all times mentioned, Jason Sage was acting as an agent for Fremont Freewheelers,
5 who ratified his conduct. Therefore, Fremont Freewheelers as his principal is vicariously liable
6 for the negligent conduct of their agent, Jason Sage. See e-mail from Jason Sage "Sally is cool
7 with it", proving that Sally Wilson, president of the Fremont Freewheelers had knowledge of
8 what Jason Sage was doing and ratified his conduct.

9 Therefore, plaintiffs request that this court order that plaintiffs may amend their
10 Complaint to allege this cause of action against defendant Sage and the Fremont Freewheelers
11 and to more clearly state vicarious liability in its previously pled causes of action.

E. THIS COURT SHOULD PROPERLY ALLOW PLAINTIFFS TO AMEND THEIR PLEADINGS TO ASSERT A CAUSE OF ACTION FOR MALICIOUS PROSECUTION-FORMAL CRIMINAL PROCEEDING

15 The elements of a cause of action for Malicious Prosecution-Formal Criminal Proceeding
16 are as follows:

In the present case there are facts which are now evidence before the jury to prove all of

1 the required elements of this cause of action.

2 1. Jason Sage and Fremont Freewheelers through their testimony and
3 the e-mails they provided to the police prove that they were actively
4 involved. Further, Jason Sage's e-mail indicates that he was going to
5 harass the District Attorney to make sure plaintiff LOPES was prosecuted.
6 Sage testified that he spoke with the District Attorney at least six (6) times.
7 The jury could infer from that testimony that he was actively involved.

8 2. The criminal proceeding ended in plaintiff's favor as it was dismissed when
9 the District Attorney decided not to retry plaintiff LOPES.

10 3. There is evidence before the jury in the form of testimony from Jason Sage
11 which establishes the following: Jason Sage as a paralegal understood the
12 burden of proof for both civil and criminal cases. He understood that
13 if plaintiff LOPES was found guilty of the crimes of misdemeanor battery
14 that it was highly unlikely that LOPES would find an attorney to bring
15 a civil case against him and the Fremont Freewheelers. E-mails from
16 the members, such as Richard Brookie, confirm that Fremont Freewheelers
17 race committee knew this as well. Therefore, their motivation in making
18 sure the District Attorney tried LOPES before his peers was to avoid
19 civil liability for their negligent acts; starting the race with LOPES present and
20 swinging out into LOPES' lane, causing the collision and his injuries.

21 4. Plaintiff LOPES was harmed as his work suffered, he suffered serious
22 emotional distress and was treated by Dr. Ramseur who testified that
23 this stress exacerbated his then existing post traumatic stress disorder
24 from the trauma suffered in the subject accident. Plaintiff, Teresa
25 Lopes, also testified that the stress in the family was ten times worse after her
26 husband was charged with a crime.

27 5. Defendant's conduct was a substantial factor in causing plaintiffs' harm because

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they actively stayed involved in LOPES' prosecution after giving unsupported factual statements to the police at the scene and later following up with other e-mails to persuade the police to continue to encourage the District Attorney to prosecute LOPES. Defendants did this fully understanding that there were no eyewitnesses to the collision between LOPES and the cyclists.

Officer Wren is expected to testify that he did no further investigation beyond interviewing witnesses at the scene and forwarding e-mails and photographs on a CD provided by Sage and the Fremont Freewheelers to the District Attorney.

See Declaration of Officer Wren attached to Declaration of Patricia A. Turnage, filed support of this motion. Therefore, defendants' conduct was a substantial factor in causing harm to LOPES from being prosecuted in a former criminal proceeding.

13 At all times mentioned, Jason Sage was acting as an agent for Fremont Freewheelers,
14 who ratified his conduct. Therefore, Fremont Freewheelers as his principal is vicariously liable
15 for the actively involved conduct of its agent, Jason Sage. See e-mail from Jason Sage "Sally is
16 cool with it", proving that Sally Wilson, president of the Fremont Freewheelers, had knowledge
17 of what Jason Sage was doing and ratified his conduct..

18 Therefore, plaintiffs request that this court order that plaintiffs may amend their
19 Complaint to allege this cause of action against Jason Sage and the Fremont Freewheelers, and to
20 include in their amended complaint a prayer for punitive damages for such outrageous conduct.

III.

CONCLUSION

23 Because it was always Plaintiffs' assessment that evidence of his prosecution in a
24 criminal proceeding was highly prejudicial, he never pursued causes of action arising out of the
25 wrongful prosecution of crimes of battery against him, although he understood Jason Sage and
26 Fremont Freewheelers were actively involved in his prosecution. Now that plaintiffs' motion in
27 limine was denied to allow in such evidence, the jury has heard evidence of the arrest warrant,

1 the prosecution and the outcome of the criminal proceeding. The jury has also heard evidence
2 that such arrest and its legal aftermath caused serious emotional distress to both plaintiffs.
3 Therefore, it is proper that this court should order that Plaintiffs be allowed to amend their
4 pleadings to assert these three causes of action against Jason Sage and the Fremont Freewheelers.

5 Plaintiffs respectfully request that this Court allow them to amend their pleadings
6 according to proof to assert these causes of action against these named Defendants and to state
7 more clearly their prior allegations in previously pled causes of action of vicarious liability
8 against Fremont Freewheelers and USA Cycling dba USCF, NORBA & USPRO.

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10 Dated: July 14, 2007

Respectfully Submitted,

11 LAW OFFICES OF PATRICIA TURNAGE

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13 Attorney for Plaintiffs, Cornelius Lopes and
14 Teresa Lopes

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FILED
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5 Attorney for Plaintiffs
Neal and Teresa Lopes

JUL 16 2007

CLERK OF THE SUPERIOR COURT
By John Spano, Jr. Deputy

8 SUPERIOR COURT OF CALIFORNIA
9 IN AND FOR THE COUNTY OF ALAMEDA

10 CORNELIUS LOPES, TERESA LOPES,)
11)
12)
13 Plaintiffs,)
14 vs.)
15 FREMONT FREEWHEELERS, ET.AL.)
16 Defendants.)
17 _____

Case No: HG0620161

DECLARATION OF PATRICIA A.
TURNAGE IN SUPPORT OF
PLAINTIFFS' MOTION TO
AMEND PLEADINGS TO CONFORM
TO PROOF

Trial Date: June 22, 2007
Dept.: 511
Hearing Date: TBA

18 I, Patricia A. Turnage, declare:

19 1. I am an attorney, duly licensed to practice law before the courts of the State of
20 California and am the attorney of record for plaintiffs, Cornelius Lopes and Teresa
21 Lopes.

22 2. At the time I prepared and filed this Complaint I did not include the three
23 causes which plaintiffs seek to include in their complaint by order of this
24 Court as I always intended to file a motion in limine to keep such evidence out.

25 3. Prior to the commencement of this trial, I made a motion in limine to exclude any
26 evidence of criminal prosecution of my client, Neal Lopes, as it related to

1 the facts of his alleged battery on two cyclists, Robert Parker and Larry
2 Upthegrove. Much to my dismay, the motion in limine was denied.

3 3. Prior to the commencement of this trial, the judge instructed counsel
4 that the jury could be told that Plaintiff was tried, that a mistrial was
5 declared and that the charges against Plaintiff were dismissed.
6 4. During jury selection and throughout this trial the jury has heard that
7 plaintiff was charged with crimes of battery, prosecuted and that the
8 charges were subsequently dismissed.
9 5. Prior to the commencement of this trial, the judge also intimated that
10 plaintiffs' counsel would be bringing forth evidence of plaintiffs' damages
11 from being arrested and prosecuted for the crimes.
12 6. At the trial of this matter, I introduced admissible, credible evidence
13 of defendant Jason Sage and Fremont Freewheelers' conduct which
14 led to plaintiff's arrest, prosecution and appearing at a prior criminal
15 proceeding.
16 7. I bring this motion in good faith to amend the complaint so as to conform
17 to proof.
18 8. Attached to this declaration is a true and correct copy of a Declaration of
19 Investigating Officer, Joseph D. Wren, Newark Police Department. Said
20 Declaration was filed in support of a motion for summary judgment in the
21 Federal Court Case No. C-06-03705 CRB. This action was filed by my client in
22 the United States District Court, Northern District of California, against Officer
23 Joseph Dale Wren and others. Plaintiffs request that this court take judicial
24 notice of this pleading as evidence that Officer Wren did no independent
25 investigation beyond that of what was provided to him by Fremont
26 Freewheelers and its members.

1 9. Attached to this declaration is a true and correct copy of the proposed Amended
2 Complaint which has been amended according to proof and which has added
3 language to other previously stated causes of action to state vicarious
4 liability more clearly against the principals, Fremont Freewheelers and
5 USA Cycling dba USCF, NORBA & USPRO.

6 I declare under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct.

8 Executed this 14th day of July, 2007 at Hayward, California.

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3 (925) 256-6180
4 (925) 943-6190 (fax)

5 Attorney's for defendants
Joseph Dale Wren; Officer Badge 56
6 City of Newark; Newark Police Department

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(San Francisco Division)

18 I, Joseph D. Wren, hereby declare as follows:

19 1. Presently, I am an officer with the Ceres Police Department. In June of 2004, I
20 was an officer with the Newark Police Department.

21 2. In that capacity, fellow officer Farley and I were dispatched at approximately
22 8:20 a.m. on June 14, 2004 to investigate an accident involving a pedestrian and a bicyclist at
23 the Eureka Circle Course.

24 3. As a part of my investigation, I interviewed the plaintiff and several witnesses
25 (e.g. Bob Parker, Byron Sheppard, Lloyd Rath, and Jason Sage) and reviewed officer Farley's
26 investigative report. The results of those interviews were included in my initial police report of
27 June 12, 2004 (a true and correct copy of which is attached as Exhibit A).

1 4. When I arrived, I noticed that the roadway had been shut down and a race course
2 had been established. Mr. Lopes, with a mangled face, was sitting on the curb. Although he
3 was "confused" about "what happened," he confirmed that he had been in the "roadway running
4 in the opposite direction of the bicycle racers." He made no other statements and eventually was
5 transported by ambulance to Washington Hospital.

6 5. Prior to this incident, I was neither aware of Mr. Lopes, nor acquainted with him.

7 6. The next day, I spoke with Mr. Lopes. He denied being told to stay off the track,
8 arguing with anyone or sticking his arm out while jogging. I included his statement in an
9 attachment to my police report. Furthermore, he faxed a written statement to me and I
10 submitted it on June 14, 2004 with my police report to my supervisor, Lt. Donna Shearn.

11 7. Shortly thereafter, Lt. Shearn directed me to obtain further information at the
12 request of the District Attorney's Office. I did so and, on July 2, 2004, witness Jason Sage sent
13 additional witness statements and a CD, which I included in a supplemental police report (a true
14 and correct copy of which is attached as Exhibit B). I submitted both to the District Attorney's
15 Office.

16 8. On July 6, 2004, I received a further request from the District Attorney's Office,
17 this time to locate the bicyclist who had been struck. In a second supplemental report (a true
18 and correct copy of which is attached as Exhibit C), I identified Robert Parker as that person.

19 9. Once I submitted the last (of two) supplemental report, my involvement with the
20 incident ended.

21 10. I neither met nor spoke with a representative of the District Attorney's Office
22 concerning the decision to file (or not file, for that matter) a criminal complaint or an arrest
23 warrant.

If called as a witness, I could so testify competently under oath. So declared under
penalty of perjury this 1st day of May, 2007, at Ceres, California.

JOSEPH D. WREN

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):

Patricia A. Turnage SBN 127873
 Law Offices of Patricia Turnage
 1260 "B" Street, Suite 140

Hayward, CA 94541

TELEPHONE NO: 510-727-6752

FAX NO. (Optional): 510-727-6751

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name): Cornealius Lopes

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda

STREET ADDRESS: 24405 Amador Street

MAILING ADDRESS:

CITY AND ZIP CODE: Hayward, 94544

BRANCH NAME: Superior Court

PLAINTIFF: Cornealius Lopes

DEFENDANT: Fremont Freewheelers, Jason Sage, USA Cycling
 dba USCF, NORBA & USPRO; Jeff Wu, Bob Parker, Paul Chuck,
 Larry Upthegrove, Lloyd Rath and

 DOES 1 TO 20**COMPLAINT—Personal Injury, Property Damage, Wrongful Death** AMENDED (Number): ONE

Type (check all that apply):

<input type="checkbox"/> MOTOR VEHICLE	<input type="checkbox"/> OTHER (specify):
<input type="checkbox"/> Property Damage	<input type="checkbox"/> Wrongful Death
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Other Damages (specify):

Jurisdiction (check all that apply):

<input type="checkbox"/> ACTION IS A LIMITED CIVIL CASE	Amount demanded	<input type="checkbox"/> does not exceed \$10,000
<input type="checkbox"/> ACTION IS AN UNLIMITED CIVIL CASE (exceeds \$25,000)		<input type="checkbox"/> exceeds \$10,000, but does not exceed \$25,000
<input checked="" type="checkbox"/> ACTION IS RECLASSIFIED by this amended complaint	<input type="checkbox"/> from limited to unlimited	
	<input type="checkbox"/> from unlimited to limited	

CASE NUMBER:

HG06260161

1. Plaintiff (name or names): Cornealius Lopes and Teresa Lopes

alleges causes of action against defendant (name or names): Fremont Freewheelers, Jason Sage, USA Cycling dba USCF, NORBA & USPRO, Larry Upthegrove, Bob Parker, Paul Chuck, Lloyd Rath and Jeff Wu

2. This pleading, including attachments and exhibits, consists of the following number of pages: 10

3. Each plaintiff named above is a competent adult

a. except plaintiff (name):

- (1) a corporation qualified to do business in California
- (2) an unincorporated entity (describe):
- (3) a public entity (describe):
- (4) a minor an adult
 - (a) for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
 - (b) other (specify):
- (5) other (specify):

b. except plaintiff (name):

- (1) a corporation qualified to do business in California
- (2) an unincorporated entity (describe):
- (3) a public entity (describe):
- (4) a minor an adult
 - (a) for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
 - (b) other (specify):
- (5) other (specify):

 Information about additional plaintiffs who are not competent adults is shown in Attachment 3.

Page 1 of 3

SHQRT TITLE: Lopes v. Fremont Freewheelers, et al.

CASE NUMBER:

HG06260161

4. Plaintiff (name):
is doing business under the fictitious name (specify):
and has complied with the fictitious business name laws.

5. Each defendant named above is a natural person
 a. except defendant (name): Fremont
Freewheelers
 (1) a business organization, form unknown
 (2) a corporation
 (3) an unincorporated entity (describe):
 (4) a public entity (describe):
 (5) other (specify): non-profit
organization

c. except defendant (name):
 (1) a business organization, form unknown
 (2) a corporation
 (3) an unincorporated entity (describe):
 (4) a public entity (describe):
 (5) other (specify):

b. except defendant (name): USA Cycling dba
USCF, NORBA and USPRO
 (1) a business organization, form unknown
 (2) a corporation
 (3) an unincorporated entity (describe):
 (4) a public entity (describe):
 (5) other (specify):

d. except defendant (name):
 (1) a business organization, form unknown
 (2) a corporation
 (3) an unincorporated entity (describe):
 (4) a public entity (describe):
 (5) other (specify):

Information about additional defendants who are not natural persons is contained in Attachment 5.

6. The true names of defendants sued as Does are unknown to plaintiff.
 a. Doe defendants (specify Doe numbers): 1-20 were the agents or employees of other
named defendants and acted within the scope of that agency or employment.

b. Doe defendants (specify Doe numbers): 1-20 are persons whose capacities are unknown to
plaintiff.

7. Defendants who are joined under Code of Civil Procedure section 382 are (names):

8. This court is the proper court because
 a. at least one defendant now resides in its jurisdictional area.
 b. the principal place of business of a defendant corporation or unincorporated association is in its jurisdictional area.
 c. injury to person or damage to personal property occurred in its jurisdictional area.
 d. other (specify):

9. Plaintiff is required to comply with a claims statute, and
 a. has complied with applicable claims statutes, or
 b. is excused from complying because (specify):

PLD-PI-001

SHORT TITLE: Lopes v. Fremont Freewheelers, et al.	CASE NUMBER: HG06260161
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10. The following causes of action are attached and the statements above apply to each (each *complaint must have one or more causes of action attached*):

- Motor Vehicle
- General Negligence
- Intentional Tort
- Products Liability
- Premises Liability
- Other (specify): Loss of Consortium, Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; Malicious Prosecution- Prior Criminal Proceeding

11. Plaintiff has suffered

- wage loss
- loss of use of property
- hospital and medical expenses
- general damage
- property damage
- loss of earning capacity
- other damage (specify): permanent scarring and loss of feeling in lower lip, jaw; 7 chipped/fractured teeth; psychological injury, severe emotional distress, physical injury to neck and back and face, loss of consortium

12. The damages claimed for wrongful death and the relationships of plaintiff to the deceased are

- listed in Attachment 12.
- as follows:

13. The relief sought in this complaint is within the jurisdiction of this court.

14. Plaintiff prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and for

- (1) compensatory damages
- (2) punitive damages

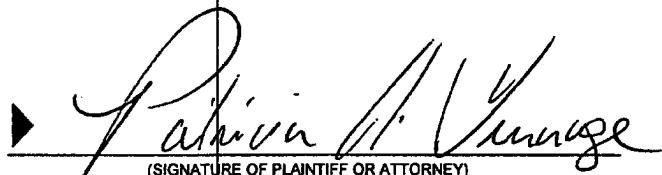
The amount of damages is (*in cases for personal injury or wrongful death, you must check (1)*):

- according to proof
- in the amount of: \$

15. The paragraphs of this complaint alleged on information and belief are as follows (*specify paragraph numbers*):

Date: July 15, 2007

Patricia A. Turnage
(TYPE OR PRINT NAME)


(SIGNATURE OF PLAINTIFF OR ATTORNEY)

SHORT TITLE: Lopes v. Fremont Freewheelers, et al.

CASE NUMBER:

HG06260161

FIRST

(number)

CAUSE OF ACTION—Motor VehicleATTACHMENT TO Complaint Cross - Complaint

(Use a separate cause of action form for each cause of action.)

Plaintiff (name): Cornealious Lopes

MV-1. Plaintiff alleges the acts of defendants were negligent; the acts were the legal (proximate) cause of injuries and damages to plaintiff; the acts occurred
on (date): June 12, 2004

at (place): Technology Park, 3900 Block of Eureka Street, Newark, California.
Plaintiff further alleges that bicycles are subject to applicable statutes of the California Vehicle Code. As such the below-named bicyclists' conduct is governed by the California Vehicle Code. Plaintiff alleges that the below-named defendants violated the applicable provisions of the California Vehicle Code, which resulted in striking plaintiff, knocking him to the ground, and causing him to lose consciousness and to suffer physical and mental injury, all to his detriment.

MV-2. DEFENDANTS

a. The defendants who operated a motor vehicle are (names): Bob Parker, Paul Chuck, Larry Upthegrove, Lloyd Rath

Does 1 _____ to 8 _____

b. The defendants who employed the persons who operated a motor vehicle in the course of their employment are (names):

Does _____ to _____

c. The defendants who owned the motor vehicle which was operated with their permission are (names):

Does _____ to _____

d. The defendants who entrusted the motor vehicle are (names):

Does _____ to _____

e. The defendants who were the agents and employees of the other defendants and acted within the scope of the agency were (names):

Does _____ to _____

f. The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are
 listed in Attachment MV-2f as follows:

Bob Parker, Paul Chuck, Larry Upthegrove, Lloyd Rath

Defendants' liability is based upon their negligent and careless operation of bicycles in responding to "an attack" which resulted in defendants striking plaintiff, knocking him unconscious, proximately causing him physical and psychological injury to his body, shock to his nervous system, great emotional distress, and other damages, according to proof.

Does _____ to _____

SHORT TITLE: Lopes v. Fremont Freewheelers, et al.

CASE NUMBER:
HG06260161SECOND

(number)

CAUSE OF ACTION—General Negligence

Page 5

ATTACHMENT TO Complaint Cross - Complaint

(Use a separate cause of action form for each cause of action.)

GN-1. Plaintiff (name): Cornealius Lopes

alleges that defendant (name): Fremont Freewheelers; USA Cycling dba USCF, NORBA & USPRO; Bob Parker, Paul Chuck, Larry Upthegrove, Lloyd Rath, Jeff Wu

 Does 1 _____ to 10 _____

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant negligently caused the damage to plaintiff

on (date): June 12, 2004

at (place): Technology Park, 3900 Block of Eureka Street, Newark, California

(description of reasons for liability):

Plaintiff alleges that the defendants, and each of them, owed him a duty of care to keep him safe while he was jogging in the Technology Business Park. Defendants breached their duty of care by deciding to go forward with a permitted bicycle race with plaintiff on the course. At all times mentioned herein Defendants understood that the permit allowed them to call the police to advise plaintiff to leave the course. Defendants, and each of them, failed to call the police or to take reasonable steps in removing plaintiff from the course. As a proximate result of the negligence of defendants, and each of them, plaintiff suffered bodily and emotional injury all to his detriment.

Plaintiff further alleges that bicycles are subject to applicable statutes of the California Vehicle Code and must yield to pedestrians. As such the below-named bicyclists' conduct is governed by the California Vehicle Code. Plaintiff alleges that the below-named defendants violated the applicable provisions of the California Vehicle Code, which resulted in striking plaintiff, knocking him to the ground, and causing him to lose consciousness and to suffer physical and mental injury, all to his detriment. Plaintiff further alleges that specifically Paul Chuck, Robert Parker, Lloyd Rath and Larry Upthegrove caused harm and damages to plaintiff when they left their lane and entered into plaintiff's lane, coming in close contact to him and then eventually hitting him head-on. At all times mentioned herein, plaintiff acted reasonably in attempting to avoid this imminent peril.

At all times mentioned herein, plaintiff alleges that defendants Jason Sage and Jeff Wu were acting as agents for their principals, USA Cycling dba USCF, NORBA & USPRO, respectively. As such Fremont Freewheelers and USA Cycling dba USCF, NORBA & USPRO are vicariously liable for the negligent acts of their agents.

SHORT TITLE: Lopes v. Fremont Freewheelers, et al.
NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS

CASE NUMBER:
HG0260161

THIRD CAUSE OF ACTION—General Negligence

(number)

Page 6

ATTACHMENT TO Complaint Cross - Complaint

(Use a separate cause of action form for each cause of action.)

GN-1. Plaintiff (name): Cornealius Lopes and Teresa Lopes

alleges that defendant (name): Fremont Freewheelers; Jason Sage, Bob Parker, Lloyd Rath, Larry Upthegrove

Does 10 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant negligently caused the damage to plaintiff

on (date): June 12, 2004 and on subsequent dates thereafter

at (place): Fremont, Newark, San Francisco, San Jose, Sunnyvale, Castro Valley, CA and other Ca. cities

(description of reasons for liability):

Defendants named above and other members of the Fremont Freewheelers did act in such a negligent manner so as to disseminate factually unsupported statements and e-mails to the Newark Police Department, which resulted in Plaintiff's subsequent arrest and prosecution for the crimes of battery. Defendants, and each of them, knew or should have known that such negligent conduct on their part would lead to plaintiffs suffering serious emotional distress.

As a proximate result of defendants', and each of them, negligent conduct, Plaintiffs, Cornealius Lopes and Teresa Lopes, suffered serious emotional distress, all to their detriment. Plaintiff, Cornealius Lopes, sought and did receive psychological treatment for such serious emotional distress. The defendants, and each of them, negligence was a substantial factor in causing plaintiff's serious emotional distress; i.e., suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, embarrassment and shame, all to their damage.

Defendant Fremont Freewheelers ratified Jason Sage and its members' negligent conduct. Therefore, Defendant, Fremont Freewheelers, as principal, is vicariously liable for the negligence of Jason Sage and its members, its agents.

SHORT TITLE: Lopes v. Fremont Freewheelers, et al.	CASE NUMBER HG06260161
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INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

FOURTH _____
(number)

CAUSE OF ACTION—Intentional Tort

Page 7

ATTACHMENT TO Complaint Cross-Complaint

(Use a separate cause of action form for each cause of action.)

IT-1. Plaintiff (name): Cornealious Lopes and Teresa Lopes

alleges that defendant (name): Fremont Freewheelers, Jason Sage, Bob Parker, Lloyd Rath, Larry Upthegrove

 Does 10 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff

on (date): June 12, 2004 and on subsequent dates thereafter

at (place): Fremont, Newark, San Francisco, San Jose, Sunnyvale, Castro Valley, CA and other CA. cities

(description of reasons for liability):

Defendant, Jason Sage and the Fremont Freewheelers race committee did act in such an intentional manner so as to disseminate factually unsupported statements and e-mails to the Newark Police Department, which resulted in Plaintiff, Cornealious Lopes, being charged with a crime. Such conduct was outrageous and done with a reckless disregard of the probability that plaintiffs would suffer emotional distress, knowing that plaintiffs would experience emotional distress when Cornealious Lopes was charged with crimes. As a proximate result of Defendants' conduct, Plaintiffs suffered serious emotional distress, all to their detriment. Plaintiff, Cornealious Lopes, sought and did receive psychological treatment for such serious emotional distress. The defendants, and each of them, outrageous conduct was a substantial factor in causing plaintiffs' serious emotional distress; i.e., suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation embarrassment and shame, all to their damage.

Defendant Fremont Freewheelers ratified Jason Sage and the race committee's outrageous conduct. Therefore, Defendant, Fremont Freewheelers, as principal, is vicariously liable for the intentional, outrageous conduct of its agents.

Defendant, Jason Sage's and Fremont Freewheelers' intentional conduct was so outrageous and done in conscious disregard for the rights of Plaintiffs so as to justify an award of punitive damages.

SHORT TITLE: Lopes v. Fremont Freewheelers, et al.

CASE NUMBER
hg06260161

MALICIOUS PROSECUTION-PRIOR CRIMINAL PROCEEDING

FIFTH

(number)

CAUSE OF ACTION—Intentional Tort

Page 8

ATTACHMENT TO Complaint Cross-Complaint

(Use a separate cause of action form for each cause of action.)

IT- 1. Plaintiff (name): Cornealius Lopes

alleges that defendant (name): Fremont Freewheelers, Jason Sage, Bob Parker, Lloyd Rath, Larry Upthegrove

Does 10 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff

on (date): June 12, 2004 and on subsequent dates thereafter

at (place): Fremont, Newark, San Francsico, San Jose, Sunnyvale, Castro Valley, CA and other CA cities

(description of reasons for liability):

Defendant, Jason Sage, and other members of the race committee of Fremont Freewheelers became actively involved in causing plaintiff, Cornealius Lopes, to be prosecuted and/or in causing the continuation of the prosecution against Plaintiff, Cornealius Lopes. The prosecution of plaintiff ended in plaintiff's favor as there was a mistrial and the District Attorney chose not to retry Plaintiff, and dismissed the case. However, plaintiff suffered serious emotional distress as a result of the prosecution and an arrest remains on Cornealius' Lopes record, all to his detriment.

At all times mentioned herein, the Defendants, and each of them, did not reasonably believe or had no reason to believe that Cornealius Lopes had caused the collision as the collision occurred in Plaintiff's lane while cyclists entered into Plaintiff's path. Also, Defendants, and each of them, knew that there were no eyewitnesses to the collision.

At all times mentioned herein, the Defendants, and each of them, acted primarily for a purpose other than that of bringing plaintiff to justice; i.e., to escape civil liability for the cyclists who struck down plaintiff and for Jason Sage, the promoter, who, inter alia, began the race when plaintiff was present on the course.

As a proximate result of the conduct of Jason Sage and Fremont Freewheelers' race committee members, Plaintiff, Cornealius Lopes, was harmed. Said conduct of these Defendants was a substantial factor in causing Plaintiff's harm.

Defendant Fremont Freewheelers ratified Jason Sage and the race committee's conduct in becoming involved and remaining involved in the criminal proceedings against Plaintiff, all to his detriment.

SHORT TITLE: Lopes v. Fremont Freewheelers, et al.

CASE NUMBER:

HG06260161

1 FIFTH CAUSE OF ACTION (CONT'D) -MALICIOUS PROSECUTION-PRIOR CRIMINAL

2 PROCEEDING

3

4 At all times mentioned herein Defendants, Jason Sage and Fremont
 5 Freewheelers', conduct in becoming and remaining involved in plaintiff's
 6 prosecution and criminal proceeding was so outrageous and done with
 7 conscious disregard for the rights of Plaintiff, Cornealius Lopes. Such
 8 outrageous conduct and conscious disregard is sufficient to justify an award
 9 of punitive damages against these defendants.

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26 (Required for verified pleading) The items on this page stated on information and belief (specify item numbers, not line
 27 numbers):

This page may be used with any Judicial Council form or any other paper filed with this court.

Page 9

SHORT TITLE: Lopes v. Fremont Freewheelers, et al.	CASE NUMBER: HG06260161
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ATTACHMENT (Number): Two
 (This Attachment may be used with any Judicial Council form)

Page 10 of 10
 (Add pages as required)

SIXTH CAUSE OF ACTION ---LOSS OF CONSORTIUM- (As to all Named Defendants and Does 1 to 20)

On or about June 12, 2004, and at all relevant times mentioned herein, plaintiff, Teresa Lopes, was and is the spouse of plaintiff, Cornealius Lopes. As a proximate result of defendants', and each of them, negligent and intentional conduct, Cornealius Lopes was injured, both physically and emotionally. His injuries resulted in a loss of consortium to Teresa Lopes, his spouse, as she was deprived of the love, joy, comfort and society of her spouse, all to her detriment.

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27	(If the item that this Attachment concerns is made under penalty of perjury, all statements in this Attachment are made under penalty of perjury.)

1 PATRICIA A. TURNAGE, #127873
2 LAW OFFICES OF PATRICIA TURNAGE
3 1260 "B" Street, Suite 140
Hayward, CA 94541
Telephone: (510) 727-6752
Fax: (510) 727-6751

5 Attorney for Plaintiffs
Neal and Teresa Lopes

FILED
ALAMEDA COUNTY

JUL 16 2007

CLERK OF THE SUPERIOR COURT
By John Sean Mathews
Deputy

8 SUPERIOR COURT OF CALIFORNIA
9 IN AND FOR THE COUNTY OF ALAMEDA

10 CORNELIUS LOPES, TERESA LOPES,)
11)
12 Plaintiffs,)
13)
14 vs.)
15 FREMONT FREEWHEELERS, ET.AL.)
16 Defendants.)

Case No: HG0620161

SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO AMEND
PLEADINGS ACCORDING TO PROOF

17 TO DEFENDANTS, JASON SAGE; USA CYCLING dba USCF, , NORBA & USPRO
18 FREMONT FREEWHEELERS JEFF WU, BOB PARKER, PAUL CHUCK, LARRY
19 UPTHEGROVE, and LLOYD RATH, AND TO THEIR ATTORNEYS OF RECORD:

20 Plaintiffs, Cornealius Lopes and Teresa Lopes, submit this supplemental memorandum of
21 points and authorities in support of their previously filed motion to amend the pleadings
22 according to proof.

I.

24 THE EVIDENCE BEFORE THE JURY IS
25 SUFFICIENT TO ALLOW THE JURY TO
DECIDE WHETHER THE DEFENDANTS'
CONDUCT WAS MOTIVATED BY
26 THE DEFENDANTS' DESIRE TO ESCAPE CIVIL
LIABILITY.
27

1
2 It is well-established that the tort of malicious prosecution-prior criminal proceeding
3 focuses on the involvement of the defendants in prosecution of the crimes. One who procures a
4 third person to institute a malicious criminal prosecution is liable, to the same extent as if he or
5 she instituted it. The test is whether the defendant was actively instrumental in causing the
6 prosecution. See *Blancett v. Burr* (1929) 200 Cal.App. 61, 62; *Centers v. Dollar Markets* (1950)
7 99 Cal.App.2d 534, 544; *Rupp v. Summerfield* (1958) 161 Cal.App.2d 657, 663.

8 In this trial, there has been evidence that the witnesses were actively instrumental in
9 causing the prosecution to occur. The bench warrant for LOPES' arrest was not issued until mid
10 July, 2004, after the e-mails and photographs had been submitted to the police. Clearly the e-
11 mails and photographs were forwarded to the District Attorney. See Officer Wren's declaration
12 attached to Declaration of Patricia A. Turnage, filed herewith and incorporated herein by
13 reference.

14 In *Sandoval v. Southern Calif. Enterprises* (1950) 98 Cal.App.2d 240, plaintiff, ejected
15 from defendant's dance hall, returned to demand a refund of the price of a ticket. Defendant's
16 special officers beat him and called the police. In finding in favor of Plaintiff for malicious
17 prosecution, the jury found that Plaintiff was prosecuted as the result of the defendant's
18 involvement in the proceedings and to discourage plaintiff from bringing a civil suit for battery.

19 In the present case, just as in *Sandoval*, Plaintiff was hit by defendant cyclists. Fremont
20 Freewheelers then gave false information to the police that Plaintiff had punched a cyclist. As a
21 result Plaintiff was charged with crimes of battery. Jason Sage had a copy of the police report
22 wherein Byron Sheppard stated that he saw LOPES punch a cyclist. Jason Sage told this jury
23 that he always understood that there were no eye witnesses to this collision. Therefore, he knew
24 the police report was incorrect but did nothing to stop this prosecution. On the contrary, he
25 continued to work with the District Attorney prior to the trial. He knew that none of the people
26 on the Fremont Freewheelers knew what happened. Yet, he allowed a prosecution to go forward

against a man that had moved into the cyclists lane, full well knowing that the cyclists hit LOPES head on in his lane, directly in the path he had jogged in for five laps previously. There is certainly enough evidence that a jury could find that Jason Sage and the Fremont Freewheelers had a stake in the outcome of the criminal trial. In other words, if LOPES was convicted, the burden of proof in the criminal trial would make it impossible to find an attorney to represent him in a civil case for his personal and psychological injuries. Any attorney worth his/her salt would know that the criminal conviction would act as res judicata in any subsequent civil proceeding and would bar LOPES' recovery.

II.
**PLAINTIFF'S CRIMINAL PROCEEDING
WAS FAVORABLE.**

It is well established caselaw that a dismissal in a criminal proceeding equals a favorable proceeding for LOPES. In *Jaffe v. Stone*, (1941) 18 Cal.2d 146. In Jaffe, the California Supreme Court held that an action for malicious prosecution may be brought when the particular proceeding is thus terminated, regardless of whether the dismissal is a bar to further prosecution for the same offense. In this case the criminal proceeding against LOPES was dismissed and there was no further prosecution of him. Clearly, the dismissal of the criminal proceeding satisfies the required element that the plaintiff must have had a favorable termination of the criminal proceedings.

Dated: July 16, 2007

Respectfully Submitted,

LAW OFFICES OF PATRICIA TURNAGE

Patricia A. Turnage, Attorney for Plaintiffs
Cornelius Lopes and Teresa Lopes